

specifications were found proved. The Administrative Law Judge suspended Appellant's license outright for a period of one month, with a three month additional suspension, remitted after 12 months of probation.

Appellant filed a timely notice of appeal on April 12, 1995, within 30 days of service of the D&O. The appeal was perfected on June 29, 1995, after Appellant received an extension. Therefore, this appeal is properly before me for review.

APPEARANCE: Appellant, *pro se*.

FINDINGS OF FACT

At all relevant times, Appellant was acting under the authority of the captioned license while serving as operator on the M/V MISS KATE, a 52-foot, uninspected towing vessel. Appellant's license authorized service as operator of uninspected towing vessels "on rivers." [Transcript (TR) at 6].

On Saturday, June 12, 1993, the M/V MISS KATE was proceeding upbound in the area of mile 846.5 on the Mississippi River, pushing two empty barges ahead. The barges, combined, measured 395 feet long. [TR at 26]. Because of the length and height of the barges, and the height of the towboat's wheelhouse, Appellant had a 200-foot blind spot while standing at the M/V MISS KATE's steering/throttle station. [TR 151-153].

At approximately noon, Appellant approached the area of the Hidden Falls Launch Ramp, a recreational boat ramp area that he had traversed over 500 times. Although aware he was approaching this area, Appellant did not post a lookout. After rounding a bend in the Mississippi River where visibility of the area is further obstructed, Appellant saw a nineteen-foot pleasure craft in the middle of the river approximately one-half mile up river. [TR at 124].

The nineteen-foot pleasure craft had just been launched from the Hidden Falls Launch Ramp. The pleasure craft's engine had stalled immediately after launching and the operator, Mrs. Diane Moe, tried to restart it. Appellant sounded one prolonged blast "mostly to make the [pleasure] boat aware...that [he] was there" but also as a passing signal. [TR at 125]. The other passengers on the pleasure boat, Mrs. Moe's teenage daughter, her daughter's friend, and Mrs. Moe's nine-year-old son, heard the blast and waved their arms to get the appellant's attention. [TR at 73]. Appellant did not see any of the passengers waving. [TR at 127].

Two deckhands, the only other personnel aboard the M/V MISS KATE, arrived in the wheelhouse to inquire about the prolonged blast. At Appellant's direction, the deckhands retrieved lifejackets and a radio, and started out to the head of the tow to act as lookouts. *Id.*

Appellant reduced speed from 4 knots to 2 knots. [TR at 125]. Appellant saw people on the river bank waving at him so he turned the towboat to starboard and again reduced speed. [TR at 127]. He could not see the pleasure craft operated by

Mrs. Moe because the craft had entered into Appellant's blind spot. *Id.* Appellant then reversed the engines. [TR at 125, 127]. Appellant never sounded the danger signal. [TR at 131].

The lead barge collided with the pleasure craft. There were no fatalities or serious injuries. Damage from the collision was limited to detachment of the pleasure craft's stern swim platform. [TR at 156]. Shortly after the collision, Mrs. Moe and her daughter saw the deckhands arrive at the head of the tow. [TR at 57, 76]. Appellant did not know that the barge had collided with the pleasure craft. [TR at 143]. The collision occurred less than five minutes after the pleasure craft had been launched. [TR at 82, 78].

Weather conditions were clear and sunny with no wind. [TR at 26]. The current was approximately two miles per hour. [TR at 106, 126].

BASES OF APPEAL

Appellant asserts the following bases of appeal from the decision of the Administrative Law Judge:

1. The Administrative Law Judge relied on contradictory and inconsistent evidence in determining that Appellant did not maintain a proper lookout.
2. The specification of failing to sound a danger signal was not proven. Alternatively, if this specification was proven, then the violation was not the proximate cause of the collision.

OPINION

I

Appellant argues that the Administrative Law Judge relied on the testimony of the six Coast Guard witnesses that was not credible in concluding that he had not properly posted a lookout. Appellant contends that these testimonies were not credible because each was either inconsistent with itself or with other witnesses' testimony. Therefore, the Administrative Law Judge erred in relying on these testimonies in determining that Appellant had not posted a proper lookout.

All inconsistent testimony indicated by Appellant appears to be the result of different, individual perspectives of the incident. The Administrative Law Judge must weigh all of the testimony, all of these inconsistencies, and all other evidence in determining the credibility of each witness's testimony. The Administrative Law Judge was in the best position to determine the facts. *See Appeal Decision 2421 (RADER), 2319 (PAVELIC)*. The Administrative Law Judge's findings must be supported by reliable, probative, and substantial evidence. *See 46 C.F.R. § 5.63, Appeal Decision 2420 (LENTZ), 2421 (RADER)*. I will reverse the decision only if the findings are arbitrary, capricious, clearly erroneous, or based on inherently incredible evidence. *See Appeal Decision 2570 (HARRIS), aff'd NTSB Order No. EM-182 (1996); 2390 (PURSER), 2363 (MANN), 2344 (KOHAJDA), 2333 (AYALA), 2581 (DRIGGERS), 2474 (CARMIENKE)*. Furthermore, conflicting evidence will not be reweighed on appeal when the Administrative Law Judge's determinations can be reasonably supported. *See Appeal Decision 2504 (GRACE), 2468 (LEWIN), 2356 (FOSTER)*. Findings of the Administrative Law Judge need not be consistent with all evidentiary material in the record as long as sufficient material exists in the record to justify the finding. *Appeal Decision 2424 (CAVANAUGH), 2282 (LITTLEFIELD), 2519 (JEPSON), 2492 (RATH), 2546 (SWEENEY)*.

The testimonies of three witnesses and of Appellant support the finding that Appellant did not have a lookout properly posted. Appellant stated that he did not know that the lead barge collided with the pleasure boat. [TR at 143]. If he had properly posted a lookout, the lookout would have informed him of the collision. Likewise, a deckhand from the M/V MISS KATE stated that he did not know of the collision. [TR at 30]. This deckhand was walking to the head of the tow to be a lookout, but at the time of the collision, he had not reached the head. Mrs. Moe and her daughter both testified that they saw two people appear at the head of the tow after the collision. [TR at 60, 76]. This too supports the finding that Appellant did not have a lookout properly posted. No testimony contradicts these statements, and none of the inconsistencies in the witnesses' testimonies relate to the issue of whether Appellant had posted a lookout.

Appellant contends that, because a witness has stated events inconsistent with other testimony, all of that witness's testimony should be disregarded. I disagree. These minor discrepancies are not related to the finding that Appellant did not post a lookout. For example, Appellant points out that the deckhand from the M/V MISS KATE first testified that he had been in the galley when Appellant had sounded the prolonged blast, but then, later, he changed his testimony to state that he had been on the fantail. [TR at 33]. The deckhand candidly admitted that he did not remember the ordinary details of the day. [TR at 34]. Appellant contends that, because the deckhand admits that he does not remember all of the day's events, all of his testimony should be disregarded. I find it reasonable that a deckhand may not remember all mundane, daily events. I also find reliable this deckhand's statement that he did not see the collision. A collision is not a daily, mundane event and, thus, a deckhand would likely remember seeing it. Therefore, the deckhand's statement that he did not see a collision is reliable.

Appellant also contends that, because Mrs. Moe's daughter's teenage friend in the pleasure boat panicked, her testimony is unreliable. I disagree. First, her testimony did not pertain to whether the towboat had a lookout. Second, all of her testimony was consistent with testimonies of other witnesses in the pleasure craft. Likewise, Appellant contends that the testimony of Mrs. Moe's daughter was not reliable because her attention had been turned towards her panicked friend. I disagree. Her statements were consistent with the statements of other witnesses that were in the pleasure boat and also with the statement of the witness who was on the riverbank.

Appellant points to minor discrepancies in the testimonies, but none of the inconsistencies pertain to the overall finding. Additionally, all statements regarding the issue of whether Appellant had posted a lookout were consistent. The Administrative Law Judge was in the best position to weigh the credibility of the witnesses and evaluate any inconsistencies. I find that the Administrative Law Judge had substantial, reliable and probative evidence to support her findings. Thus the Administrative Law Judge's finding that Appellant did not properly post a lookout was not arbitrary, capricious, clearly erroneous or based on inherently incredible evidence, and is, therefore, affirmed.

II

Appellant's second basis for appeal is that the Coast Guard failed to prove that Appellant violated Rule 34 of the Inland Navigation Rules in not sounding the danger signal. Alternatively, Appellant argues, if it is found that he is in violation of Rule 34, the specification should be dismissed because pleasure boaters do not generally know what it means and because the violation did not result in the contact between the vessels.

Appellant admits that he did not sound the danger signal. [TR at 131]. A vessel operator is required to sound the danger signal if (a) he is in sight of another vessel, (b) his vessel is approaching the other vessel and (c) he fails to understand the intentions or actions of the other vessel or is in doubt whether sufficient action is being taken by the other vessel to avoid collision. *See* 33 U.S.C. § 2034(d).

Evidence in the record shows that the vessels were in sight of one another. Appellant saw the pleasure craft and consequently sounded a prolonged passing signal. [TR at 125]. All witnesses that were in the pleasure craft saw the towboat. [TR at 52, 71, 81]. The towboat was approaching the pleasure craft. [TR at 125, 52, 73, 81]. Finally, there was substantial, reliable, and probative evidence, as discussed in Part I of this opinion, for the Administrative Law Judge to conclude that Appellant did not have a proper lookout posted. For several minutes, the pleasure craft remained within Appellant's 200-foot blind spot. From this, it was proper for the Administrative Law Judge to find that Appellant was or should have been in doubt as to whether the pleasure craft

was taking sufficient action to avoid the collision. Therefore, I find that the Administrative Law Judge was reasonable in finding that Appellant was required to sound the danger signal.

Appellant contends that "had [he] furiously blown the whistle, he may have created a dangerous situation where one arguable [*sic*] did not exist." [Appeal Brief at 9]. Appellant fails to recognize that Rule 34 is not optional. "[T]he vessel in doubt *shall* immediately..." sound the signal. 33 U.S.C. § 2034(d) (emphasis added). Appellant does not address any special circumstances that may have necessitated a departure from the Inland Rules. *See* 33 U.S.C. § 2002(b). After reviewing the record, I find no special circumstances or dangers of navigation that would have required a departure from Rules. Appellant was required to sound the danger signal.

Appellant further contends that this failure to sound the signal is not sufficient to charge a vessel with fault for a collision if it appears that the failure did not contribute to the accident. However, Appellant was not charged with fault for the collision, and the Administrative Law Judge correctly found that "while [appellant's] failure to follow Rule 34 was not a contributing cause of the accident, he was required to follow the Inland Navigation Rules, and breach of such subjects him to charges as the Coast Guard has brought." [D&O at 9]. The purpose of the hearing was not to establish the cause of the collision or fault for the collision, but solely to determine if Appellant failed to maintain a lookout and sound the danger signal in violation of law or regulation. *See* Appeal Decision 1822 (EVANS), 2581 (DRIGGERS).

CONCLUSION

The Administrative Law Judge's findings are supported by reliable, probative, and substantial evidence. The hearing was conducted in accordance with applicable law.

ORDER

The Decision and Order of the Administrative Law Judge dated February 22, 1995, is **AFFIRMED**.

/S/

R. D. HER
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C., this 21st day of July, 1997.